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No. 539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

THE PEOPLES BANK OF HAVERSTRAW,

Petitioner,

vs.

DAVID E. FELDMAN, AS TRUSTEE IN BANKRUPTCY OF GENERAL TEXTILE PROCESSORS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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DAVID E. FELDMAN, as Trustee in Bankruptcy of General Textile Processors,

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Statement.

The bankrupt represented an amalgamation of seven corporations engaged in the piece dye business. Their plants were to have operated as divisions of the bankrupt. Capitol Piece Dye Works, Inc. was one of the participating companies [A 9*].

The project died aborning. The bankrupt opened for business September 1, 1956 [A 9], was insolvent at least by September 21 [A 15], and discontinued business on November 2, 1956 [A 19, 27]. A New Jersey equity receiver was appointed November 5, and an involuntary petition in bankruptcy was filed in the New Jersey District November 7, 1956 [A 10].

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* References marked "A" are to Appendix of plaintiff-appellant below (now respondent); those marked "E" to Appendix for defendant-appellee (now petitioner); those marked "S" to appendix to the present petition.

An account with petitioner bank had been opened on September 13, 1956, primarily to meet the salaries and wages of the Capitol division, including the salary of Samuel Koenig, who had been president of Capitol and was treasurer of the bankrupt. Koenig and three other officers of the bankrupt were authorized to sign checks on the account [A 19-20].

Koenig resigned as treasurer of the bankrupt orally on November 2d [A 24], and in writing on November 5th [S 7a]. Koenig clearly intended to reconstitute Capitol as an independent unit. The District Court found that "his interests were entirely centered on the resumption of the Capitol business at the earliest possible moment", and that he did resume operation within five days after the bankrupt discontinued [A 21].

At the opening of business on November 5th, Koenig appeared at petitioner bank with a factor's check to the order of the bankrupt for $9,500 as an advance on the accounts receivable. He deposited this check in the bankrupt's account with petitioner, increasing the balance to $20,160.81. Then, at his request, petitioner bank transferred the entire corporate account to an account of "S. Koenig, Special for Payroll", first ascertaining by telephone that the $9500 check was good. The only person authorized to draw against the new account was Samuel Koenig [A 19-20].

The explanation offered by Koenig for this hasty and extraordinary transaction was that he wished to get to this account before his fellow officers did [E 8].

Checks drawn by Koenig as treasurer upon the corporate account, then began to be presented for payment. Each time a batch of these checks appeared, the bookkeeping department (since there was no longer an account in

the name of the corporation) came to a vice-president of the bank for instructions [A 44]. Each time, he got in touch with Koenig who instructed that they be paid from the "S. Koenig, Special for Payroll" account [A 47-48]. The account was all paid out in this manner, leaving a balance of only $1.76 for the trustee. On November 7, 1956, (date bankruptcy petition was filed) petitioner bank paid checks against the Koenig account amounting to $7,497.14.

Between November 8 and November 26 (the date of the adjudication in bankruptcy), it paid checks aggregating $12,662.31 [A 52]. Of these, checks aggregating $9,711.76 bore date November 9, 1956. This was a full week after the resignation of Koenig as treasurer.

The Opinions.

The Court of Appeals was divided in three ways. Judge Moore [S 9a-12a] voted no recovery. Judge Hincks [S 8a-9a] "would hold that the transaction of November 5, 1956 was a transfer of a corporate bank account made by a corporate officer to himself individually without actual authority not in the due course of the Bank's business and under circumstances which put the Bank on inquiry as to the underlying authority for the transfer." Accordingly, he would have granted recovery for the entire amount of $20,160.81.

Judge Brennan held the transaction of November 5, 1956 "did not divest the bankrupt from the ownership of the funds in the bank at that time and the same constituted a change of name in the account rather than a transfer of the title thereto" [S 6a]. He held, however, that the payments made by the bank after the filing of the petition

in bankruptcy on November 7, 1956, were not within the so-called "protective clauses" of §70(d) of the Bankruptcy Act. This opinion (on a mathematical basis), became the opinion of the Court and judgment was directed against petitioner bank for $12,662.31, with interest from November 26, 1956 [S 13a-14a].

The Statute.

By §70 of the Bankruptcy Act the trustee became vested by operation of law with the title of the bankrupt as of the date of the filing of the petition.

The only transfers which may validly be made as against the trustee are set forth in §70(d). This section, so far as material, appears in the petition [p. 3].

ARGUMENT.

I.

If it be assumed, as the Court below did, that the funds in the "S. Koenig, Special for Payroll" account remained the property of the bankrupt after the transaction of November 5th, it is difficult to see how the Court could have reached a different result than it did under the plain language of the statute.

(a) Payments were not made "upon his [the bankrupt's] order", and hence were not covered by §70(d)(2). The order of a treasurer who had resigned was not the order of the bankrupt. Even if the statute is stretched to say that the Court might rely upon the apparent authority of the former treasurer's signature, the bank did not do so. It required and sought the direction and authoriza-

tion of Koenig as an individual. According to Brooks, the vice president of petitioner, the payments were made "under the authority of the individual who had the account in his control" [A 41].

The Court of Appeals expressly found [S 7a] that the bank in making payments "did not rely thereon [Koenig's apparent authority] but in each instance sought and acted upon the oral, individual and personal authorization of Koenig to charge the special account with the checks involved".

Since this finding is well supported by the evidence [A 44, 47-48], this Court will hardly accept the case to resolve that question of fact.

(b) § 70(d) (5) [see petition, p. 3] contains a proviso:

> "That nothing in this Act shall impair the negotiability of currency or negotiable instruments."

This has no relevancy here, and for two good reasons. These checks, as the Court of Appeals held [S 7a] had no valid inception as negotiable instruments, since they lacked the signature of an authorized officer. Furthermore, the checks were presented for payment and discharge, not for negotiation.

Cunningham v. *Merchants Nat. Bank* (1 Cir. 1925) 4 F. 2d 25, cert. den. (1925) 268 U. S. 691, stands for the proposition that a bank which, in the regular course of business, pays checks upon signatures authorized by its depositor even to the exhaustion of the account, is not bound to inquire whether the payments constitute preferences. But that is not this case, and the instant transactions cannot be described as in the regular course of business.

II.

Such unusual facts unite in this case that no decision by this Court could have any general application. Banks do not usually carry corporate funds in an individual account. Treasurers do not usually draw checks after they have resigned. Banks do not usually accept oral directions to charge checks against an account upon which they are not drawn. Manifestly, petitioner does not seek the solution of questions "of great interest to the business and financial community". It seeks a rule for this case.

But this is exactly what Congress intended to prevent in the amendment of § 70 by the Chandler Act of 1938. Congress then sought to prescribe the only circumstances under which transfers of the bankrupt's property would be good against the trustee. In *Lake* v. *New York Life Insurance Co.* (1955) 218 F. 2d 394, Soper, J. said (p. 399):

> "It is obvious that the intent of this enactment is to invalidate transactions not granted specific protection under the Act and thus put to an end the confusion theretofore existing in the decisions. There is almost always some injustice or hardship which attends transactions occurring after the filing of a petition in bankruptcy between the bankrupt, acting wrongfully, and an innocent third person, because the loss must fall either upon the third person or upon the creditors of the bankrupt. Whether the line which has been drawn is the best possible solution of the problem is not for the courts to say. *The line has in fact been drawn by competent authority and it is no longer necessary for the courts to make the attempt, which has not been conspicuously successful in the past, to decide cases on the facts as they arise and to draw a fine distinction between transactions which should be protected and those which should not.*" (Emphasis added.)

This Court was evidently in agreement, since it denied certiorari (1955) 349 U. S. 917, although that was a case of genuine hardship in which the insurance company, although entirely innocent, was required to pay twice the surrender value of the bankrupt's life insurance policy.

It thus appears that in the amendments by the Chandler Act Congress sought to establish a uniform method of dealing with post-bankruptcy transfers in substitution for the assessment by the courts of relative hardship in particular situations. This petition in effect asks the Court to turn the clock back and defeat the purpose of Congress by the erosive effect of particular exceptions. Success by the petitioner would open the way for the inferior courts to deal with post-bankruptcy transfers on an *ad hoc* basis.

Indeed, there is no *general* rule which the Court could lay down applicable to this case other than to say that a bank was protected in paying out the assets of a bankrupt in good faith, even at the behest of a stranger. The equities in this case do not cry out for the adoption of such a rule [see opinion of Hincks, J. (S 8a-9a)].

III.

There is really nothing "baffling" about the reference in the prevailing opinion [S 8a] to the remedies which may be available to the bank, upon which the Court found it unnecessary to pass. The respondent had suggested below (Appellant's Brief, p. 15) that if the bank made restitution of the full amount wrongfully paid to wage claimants, it would be subrogated to their rights and could ultimately receive the same dividends to which such creditors would have been entitled. It cannot be assumed at this time that even the wage earners will be paid in full, and this application of the principle of subrogation obviously does not affect the present judgment.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
November 24, 1961.

Respectfully submitted,

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